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Nicaragua versus the United States: Issues of Law and Policy

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I. Introduction

On June 27, 1986, the International Court of Justice (ICJ) or World Court handed down a judgment on the merits in the case concerning *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*.[1] Notwithstanding the Court's holdings that the United States had committed a number of violations of fundamental norms of interna-

1. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14 (Merits Judgment of June 27) [hereinafter cited as Judgment of June 27, 1986].

There is a growing literature on the legal issues involved in relations between Nicaragua and the United States, and the litigation in the Hague. For articles generally critical of United States actions, see e.g., Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985); and Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621 (1985). For a vigorous defense of the legality of United States actions, see Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (No. 1, 1986). With respect to the Order of Interim Protection of May 10, 1984 and the Judgment on Jurisdiction and Admissibility of November 26, 1984, a number of short articles and comments have appeared in the AM. J. INT'L L. *See also* Malloy, *Developments at the International Court of Justice: Provisional Measures and Jurisdiction in the Nicaragua Case*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 55 (1984).

tional law, that it must pay reparation to Nicaragua, and that the U.S. "is under a duty to immediately cease and to refrain from all such acts" violative of these legal norms, the United States has continued to finance and support the Nicaraguan contras (from the Spanish word "contrarevolucionario" or counterrevolutionary). By July 1986, a presidential request for an additional $100 million in overt military and other assistance to the contras had been approved by both the Senate and the House, and seemed assured of final passage by the Congress.[2] As a result, there appeared to be a substantial likelihood that the United States would not, at least initially, comply with the World Court's Judgment of June 27, 1986. Such action would contravene article 94(1) of the United Nations Charter, which provides: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[3]

The Court's Judgment of June 27, 1986 was not its first decision in the case. On April 9, 1984, Nicaragua initiated legal proceedings against the United States in the World Court. On May 10, 1984, the Court issued an Order of Interim Protection[4] indicating provisional measures which were to be followed in order to protect the legal interests of the parties during the course of the litigation. On November 26, 1984, the Court, overruling U.S. objections, held that it had jurisdiction to decide the merits of Nicaragua's claims, and that there were no grounds of inadmissibility barring its adjudication of the case.[5] The United States response, on January 18, 1985, was to withdraw from any participation in the merits phase of the

2. Judgment of June 27, 1986, *supra* note 1, paras. 292, 292(12). Regarding the decision to seek funds for military assistance, see N.Y. Times, Jan. 22, 1986, at A1, col. 6. The Senate passed the President's request for $70 million in military assistance and $30 million in "humanitarian assistance" in March. After considerable maneuvering and delay, the House passed a similar measure on June 25—only two days before the Court's decision. *See, e.g.*, N.Y. Times, June 26, 1986 at A1, col. 5; Washington Post, June 26, 1986, at A1, col. 6; N.Y. Times, June 27, 1986, at A1, col. 2 (analysis of significance of House vote). Regarding the timing of the vote in relation to the Court's decision on the merits, see McCrory, *Reason Takes a Holiday*, Washington Post, June 19, 1986, at A2, col. 5. On prospects for passage, *see e.g.*, N.Y. Times, July 17, 1986, at A3, col. 1 (plans for Senate filibuster); N.Y. Times, July 20, 1986, Sec. 1, at 12, col. 5 (passage expected). [Citations to the N.Y. Times before August 1985 are generally to the National Edition—ED.]

3. U.N. CHARTER art. 94 para. 1. In the words of one commentator on the November 26, 1986 Judgment and subsequent U.S. response, "There can be no question that the undertaking of compliance contained therein [i.e., art. 94(1)] is a treaty obligation at the highest level." Highet, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AM. J. INT'L L. 992, 1003 (1985).

4. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1984 I.C.J. 169 (Interim Protection Order of May 10) [hereinafter cited as Interim Protection Order of May 10, 1984].

5. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1984 I.C.J. 392 (Jurisdiction and Admissibility Judgment of Nov. 26) [hereinafter cited as Judgment of Nov. 26, 1984].

proceedings.[6] Subsequently, on October 7, 1985, the United States announced its withdrawal from the compulsory jurisdiction of the World Court, at the same time issuing statements highly critical of its handling of the present case.[7] Such actions suggested, at least to one observer, the possibility that the United States might not comply with an adverse final judgment by the Court.[8]

The initial reaction of the Reagan administration to the ICJ's Judgment of June 27 indicated an apparently firm, though perhaps not final, decision to ignore the Court's judgment on the merits.[9] At the same time, the United States seemed to have its own legal arguments suggesting that it was the Court, not the United States, that misunderstood the relevant norms of international law.[10]

This article has several objectives. Its principal aim is to provide an overview of the many complex and often controversial issues of law and fact that have arisen in and in connection with *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*). While it is not possible, within the space available, to adequately weigh and evaluate competing arguments on all or even the most important questions, such an overview should be useful in identifying the critical issues in dispute, while relating different aspects of the case to a broader context in a manner that should facilitate further reflection and inquiry.

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6. *See* U.S. Department of State, Statement on U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, *reprinted in* 24 I.L.M. 246 (1985); U.S. Department of State, Observations on the International Court of Justice's Judgment on Jurisdiction and Admissibility in the Case of *Nicaragua v. United States of America*, *reprinted in* 24 I.L.M. 249 (1985); 79 AM. J. INT'L L. 423 (1985).

7. Note from Secretary of State George P. Shultz to the Secretary General of the United Nations, Oct. 7, 1985, *reprinted in* 24 I.L.M. 1742 (1985) (notice of withdrawal from compulsory jurisdiction of the ICJ); U.S. Department of State, Press Statement, Oct. 7, 1985, *reprinted in* 24 I.L.M. 1743, 1743-45 (1985) [hereinafter cited as Press Statement of Oct. 7, 1985] (statement regarding withdrawal from compulsory jurisdiction of ICJ). *See also* Washington Post, Oct. 8, 1985, at A1, col. 2 (comments of Abraham D. Sofaer, Legal Adviser of the Department of State).

8. The withdrawal from the proceedings on January 18, 1985 has been characterized as an "anticipatory repudiation" of the Charter obligation to comply with the final judgment of the Court. Highet, *supra* note 3, at 1003. "It is difficult to read the departmental statement in any serious manner other than that of advance notice that the United States does not and will not consider itself bound by the final judgment of the Court, either under Article 59 of the Statute or Article 94 of the Charter." *Id.* Regarding the departmental statement, see *infra* notes 36, 41 and accompanying text.

9. *See* N.Y. Times, June 28, 1986, at A1, col. 2; *id.* at A4, col 1; Washington Post, June 28, 1986, at 1, col. 5; *id.* at A14, col 3.

10. *See* N.Y. Times, June 28, 1986, at A4, col. 1 (U.S. reaction); Washington Post, June 28, 1986, at A14, col. 3 (U.S. reaction). When asked if the judgment on the merits would simply be ignored, the State Department spokesman, Charles E. Redman, replied, "After reading the opinion, we would determine what response to that opinion, if any, is appropriate. We consider our policy in Central America to be entirely consistent with international law." N.Y. Times, June 28, 1986, at A4, col. 1.

Beyond identification of the issues, this article attempts to provide a succinct account of the decisions reached by the World Court and its principal holdings in each. This overview, of course, cannot address in any comprehensive manner all of the considerations weighed by the Court in reaching a particular conclusion, the extensive literature that was available regarding certain points even before the Court's decisions, or the full range of criticisms of the Court's holdings to be found in the dissenting and separate opinions or in extrajudicial commentary. What the article can and does attempt to do is to provide a coherent account of the actions taken by the Court, in order to inform readers of the conclusions it has reached in relation to the most important issues in a rather complicated case.

A third aim is to provide an overview of the substantive law applicable to the conduct of the United States in its actions vis-à-vis Nicaragua. This treatment includes consideration of certain provisions of the U.N. and OAS charters and other multilateral conventions. Despite the Court's holding that it was unable to apply these multilateral treaties in deciding Nicaragua's claims, they provide some indication of the scope of legal arguments presented to the Court; moreover they remain legally binding on both the United States and Nicaragua.

A fourth goal of this article is to inform readers of the responses of the United States to the Court's decisions, particularly its Judgment on Jurisdiction and Admissibility of November 27, 1984. Here, no attempt is made to recapitulate the arguments made by the U.S. to and rejected by the Court. Rather, the more limited objective is to provide a summary of the fundamental charges made by the U.S., and to offer an analysis representing the personal reaction, following considerable reflection, of one international lawyer.

II. The Order of Interim Protection (May 10, 1984) and U.S. Compliance

A. The Order of Interim Protection

Concurrently with the filing of its application or complaint against the United States on April 9, 1984, Nicaragua requested that the Court indicate provisional measures to preserve its rights during the course of the proceedings, in accordance with article 41 of the Court's Statute.[11]

11. Interim Protection Order of May 10, 1984, *supra* note 5, at 171-72. Article 41 provides:
(1) The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
(2) Pending the final decision, notice of the measures suggested shall forthwith be given

1. *Prima Facie Jurisdiction*

The Court faced two basic issues in deciding this request. The first was whether there existed a prima facie basis of jurisdiction for the Court to decide the case. The second was, assuming that such a prima facie basis existed, whether the circumstances alleged by Nicaragua were such as to require the Court to indicate provisional measures to preserve the rights of either party in accordance with article 41 of the statute of the Court. The Court answered both of these questions in the affirmative.[12]

With respect to the underlying argument that the Court lacked jurisdiction to decide the dispute, or to order interim measures of protection, the United States made two basic arguments. The first was that Nicaragua itself had never accepted the compulsory jurisdiction of the Court. While under article 36(5) of the ICJ statute declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice (PCIJ) are deemed to be acceptances of the present Court's compulsory jurisdiction, the United States argued that Nicaragua had never completed the legal formalities necessary to bring its 1929 declaration accepting the PCIJ's jurisdiction into force under the statute of the PCIJ. Nicaragua had signed, but never ratified, the 1920 Protocol of Signature of the Statute of the Permanent Court of International Justice. For its 1929 Declaration accepting the compulsory jurisdiction of the PCIJ to enter into force, it had to ratify the 1920 Protocol. While it had obtained congressional approval and even sent a cable indicating it would be depositing its instrument of ratification of the 1920 Protocol, this final step was never completed.[13] Consequently, article 36(5) did not apply, and Nicaragua had never accepted the compulsory jurisdiction of the Court. Nicaragua, in turn, presented arguments supporting its position that it had accepted the ICJ's compulsory jurisdiction.

The second basic argument of the United States was that as a result of its declaration of April 6, 1984, excluding cases involving disputes with any Central American state for a period of two years,[14] the Court lacked jurisdiction to hear Nicaragua's claim. Nicaragua responded by stressing

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to the parties and to the Security Council.

Statute of the International Court of Justice, art. 41, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 [hereinafter cited as I.C.J. STAT.]. The statute forms an integral part of the United Nations Charter. U.N. CHARTER art. 92.

12. Interim Protection Order of May 10, 1984, *supra* note 4, at 179-80, 186.

13. *See* Protocol of Signature of the Statute of the Permanent Court of International Justice, Dec. 16, 1920, P.C.I.J. Stat., Ser. D., No. 1 (4th ed.), *reprinted in* 4 WORLD COURT REPORTS 11 (M. Hudson ed. 1943); M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-42, at 452 (1943) (ratification of Protocol required). Nicaragua might have ratified the 1920 Protocol, however, at any time up until the dissolution of the PCIJ in 1946. *See* Judgment of Nov. 26, 1984, *supra* note 5, at 399-404.

14. *See* Interim Protection Order of May 10, 1984, *supra* note 4, at 174-75.

that the 1946 United States declaration accepting the Court's compulsory jurisdiction, which contained no such reservation, provided that it could be denounced only on six months' notice, and that therefore it remained in effect.

While noting that it reserved any final judgment on these questions, the Court found "that the two declarations do nevertheless afford a basis on which the jurisdiction of the Court might be founded."[15] It then turned to the question of whether the circumstances alleged by Nicaragua required the indication of provisional measures.

2. *The Need for Provisional Measures*

Nicaragua argued that such interim protection was required in order to preserve the rights of its citizens "to life, liberty and security"; its right "to be free at all times from the use or threat of force against it by a foreign state"; its right of sovereignty; its right "to conduct its affairs and to determine matters within its domestic jurisdiction without interference or intervention by any foreign state"; and "the right of self-determination of the Nicaraguan people." The protection of these rights was an urgent necessity, moreover, because their enjoyment was "immediately at stake," and because the United States, far from indicating a willingness "to desist from its unlawful actions," was continuing to seek the resources to continue and intensify its actions.[16]

In response, the United States made a number of arguments against the indication of provisional measures. Several of these were suggestive of the preliminary objections regarding the admissibility of the Nicaraguan claim or the appropriateness of judicial action which the United States was to make in the jurisdictional phase of the proceedings.[17]

3. *Order Indicating Provisional Measures*

Having heard these arguments, the Court found that "the circumstances require it to indicate provisional measures . . . in order to preserve the rights claimed." In four paragraphs, the Court indicated the provisional measures to be observed "pending its final decision in the proceedings instituted on April 9, 1984 by the Republic of Nicaragua against the United States of America . . . ."[18] They were:

1. Unanimously,
   The United States of America should immediately cease and refrain from

15. *Id.* at 179.
16. *Id.* at 182.
17. *See infra* notes 60-62 and accompanying text.
18. Interim Protection Order of May 10, 1984, *supra* note 4, at 186.

any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines;

2. By fourteen votes to one,
   The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States;
3. Unanimously,
   The Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court;
4. Unanimously,
   The Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case.[19]

In its Judgment of November 26, 1984, the Court stressed that "the Order of May 10, 1984, and the provisional measures indicated therein, remain operative until the delivery of the final judgment in the present case."[20]

B. U.S. Compliance with the Interim Order

Notwithstanding the Court's Order of Interim Protection of May 10, 1984, Congress moved in the summer of 1985 to provide "humanitarian

19. *Id.* at 187. An Order of Interim Protection under article 41 of the Court's statute would appear to be legally binding on the parties. *See* S. Rosenne, The Law and Practice of the International Court 124-26 (2d rev. ed. 1985); T. Elias, New Horizons in International Law 78-83 (1979). While the original intentions of the drafters of article 41 of the statute of the PCIJ were ambiguous on this point (in 1920) and considerable scholarly debate has ensued, the obligation to comply with the decision of the Court contained in article 94(1) of the U.N. Charter, the duty to perform that and other charter obligations in good faith in accordance with article 2(2) of the charter, and the customary law rules of treaty interpretation embodied in articles 31-33 of the Vienna Convention on the Law of Treaties, applied to the interpretation of article 41 as an integral part of the charter, suggest that such orders have binding legal effect. *See* I.C.J. Stat. art. 41; U.N. Charter arts. 2 para. 2, 94 para. 1; Vienna Convention on the Law of Treaties, arts. 31-32, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 Am. J. Int'l L. 875. Regarding the scholarly debate, see J. Sztucki, Interim Measures in the Hague Court 260-94 (1983); J. Elkind, Interim Protection: A Functional Approach (1981). *See also* Stein, *Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt*, 76 Am. J. Int'l L. 499 (1982). Significantly, the United States appeared to take the view in the Tehran Hostages case that an Order of Interim Protection is legally binding. *See* J. Sztucki, *supra*, at 278-79.

20. Judgment of November 26, 1984, *supra* note 5, at 442.

assistance" to the contras and to authorize the exchange of intelligence information and advice with them. Although significant restrictions on actions by the Executive were retained in the law, its adoption, and particularly the House vote which preceded it on June 12, 1985, signaled a sharp retreat by Congress from its earlier cut-off of funding for covert operations against Nicaragua.[21] Particularly in the House, the fear on the part of a number of congressmen of being perceived as "soft on Communism," and the visit by Nicaraguan President Daniel Ortega Saavedra to Moscow shortly after an April vote in the House rejecting renewed assistance to the contras were important factors producing this shift.[22]

Several aspects of the new legislation are noteworthy. First, the 1985 Supplemental Appropriations Act of August[23] provided for $27 million in assistance to be furnished to the contras through an agency other than the CIA or the Defense Department.[24] The money was to remain available for obligation through March 31, 1986. It was to be disbursed in three equal installments, the first to be available immediately, the second following submission by the president of a report to be issued after a period of ninety days, and the third following submission of a second presidential report after the expiration of a second ninety-day period. The corresponding reports were to describe actions taken by the president aimed at resolving "the conflict in Nicaragua" through negotiations and economic measures, to include "a detailed accounting of the disbursement of any such assistance," and to cover "alleged human rights violations by the Nicaraguan democratic resistance and the Government of Nicaragua."

Second, the purposes for which the $27 million could be used were limited to "humanitarian assistance." That term was defined as follows:

> [T]he term "humanitarian assistance" means the provision of food, clothing, medicine, and other humanitarian assistance, and *it does not include* the provision of *weapons, weapons systems, ammunition, or other equipment, vehicles or material which can be used to inflict serious bodily harm or death* (emphasis added).[25]

While the ambiguities contained in the italicized language left the president with considerable discretion in interpreting this provision, the reporting

21. *See* Continuing Appropriations Act for 1985, Pub. L. 98-473, Sec. 8066, 98 Stat. 1837, 1935-37 (Oct. 12, 1984) (authorizing $24 million in assistance with restrictions, with no further aid without Congressional authorization). A presidential request for additional funding was defeated in the House on April 23, 1984. *See, e.g.*, Washington Post, Apr. 24, 1985, at A1, col. 4.

22. N.Y. Times, June 13, 1985, at A1, col. 6.

23. 1985 Supplemental Appropriations Act, Pub. L. 99-88, Ch. 5 and Sec. 101-Sec. 106, 99 Stat. 293, 322-29 (Aug. 15, 1985).

24. *Id.* at Ch. 5, 99 Stat. 324-29.

25. *Id.* at Ch. 5, 99 Stat. 325. *See* Judgment of June 27, 1986, *supra* note 1, paras. 242-43; *infra* notes 133-34 and accompanying text.

requirement suggested that Congress might pay careful attention to the interpretations adopted in considering requests for additional assistance in the future.

Third, the law provided that nothing in its provisions or in existing prohibitions against direct or indirect aid to the contras "shall be construed to prohibit the United States government from exchanging information with the Nicaraguan democratic resistance. . . ." The current appropriation of $27 million was similarly exempted from these prohibitions.[26] The net effect was to leave those prohibitions in effect through fiscal year 1985, except for the $27 million in "humanitarian assistance" and the exchange of intelligence and other information with the contras. Thus, with these exceptions, the prohibitions on secret or back-door funding remained in force.[27]

Weakening congressional opposition to United States support of the contras was further reflected in the 1986 Intelligence Authorization Act, signed into law on December 4, 1985.[28] This law authorized the resumption of limited covert aid to the contras, and authorized United States intelligence agency officials to give "advice" and information, including intelligence and counterintelligence advice and information, to the contras.[29] Classified amounts were also included for "communications" training and the development of infrastructure for the collection and exchange of information, and for the provision of communications equipment.[30] Other training of the contras, however, was prohibited, as was the use of any funds not specifically approved by the Congress.[31]

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26. 1985 Supplemental Appropriations Act, *supra* note 23, sec. 102(b).

27. *See id.* Sec. 102(a)-(b).

28. *See* 1986 Intelligence Authorization Act, Pub. L. 99-169, 99 Stat. 1002 (Dec. 4, 1985).

29. 1986 Intelligence Authorization Act, *supra* note 28, secs. 102, 105; *See* CONF. REP. 373, 99th Cong., 1st Sess. 15-16 (Nov. 14, 1985) [hereinafter cited as CONFERENCE REPORT on H.R. 2419].

30. CONFERENCE REPORT on H.R. 2419, *supra* note 29, at 15 (classified amounts for provision of communications equipment and related training to contras).

31. 1986 Intelligence Authorization Act, *supra* note 28, sec. 105(a), sec. 401; CONFERENCE REPORT on H.R. 2419, *supra* note 29, at 15-16. The statute also explicitly authorized the State Department to solicit third countries to provide "humanitarian assistance" to the contras. 1986 Intelligence Authorization Act, *supra* note 28, sec. 105(b) (2).

The major accomplishment of opponents of covert aid to the contras was the inclusion of a requirement that any covert aid beyond that specifically authorized in the classified annex to the law would require Congressional approval "of a reprogramming or of a transfer." CONFERENCE REPORT on H.R. 2419, *supra* note 29, at 15-16. *See* 130 CONG. REC. H10293-98 (daily ed. Nov. 18, 1985) (remarks on CONFERENCE REPORT). *See infra* note 33 and accompanying text.

On the other hand, the highly arcane language of the statute appeared to leave open a number of possibilities for future expansion of the renewed covert assistance to the contras. The conferees observed in their report, expanding the contemporaneous interpretation, that

The restrictions on assistance to the contras included in the legislation enacted in August and December 1985 were not insignificant, and indeed the latter made several improvements in congressional intelligence oversight procedures. Nevertheless, the net result was that, by the end of 1985, Congress had authorized the direct provision to the contras of vehicles that could be used for military transport as part of the $27 million in "humanitarian assistance," and radios that could be used to coordinate armed attacks against and within Nicaragua under the rubric of the exchange of intelligence information and advice.

In short, the United States appeared to be involved in providing the contras with equipment, material, and information and advice needed to continue their war against the Sandinistas. It also appeared that whatever, due to domestic legal prohibitions, the United States could not directly provide, might be supplied in part by "private" and third-country financing and assistance. Such "private" and third-country aid, encouraged by the United States,[32] could be expected to help provide some of the weapons, ammunition, and other material which, together with United States assistance and advice, might enable the contras to continue their efforts to "pressure," or to overthrow, the government of Nicaragua.[33]

Such "private" and third-country assistance apparently proved insufficient for the contras to successfully prosecute their war. Perhaps as a result, the administration decided to seek a renewal of direct military assistance in early 1986. President Reagan's request for $100 million in additional assistance to the contras, including $70 million of military aid

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the 1985 Continuing Appropriations Act authorized the provision of "transportation equipment" to the contras under the rubric of "humanitarian assistance." They also stated the following:

> [U]nder current law . . . the intelligence agencies may provide advice, including intelligence and counterintelligence advice, and information, including intelligence and counterintelligence information, to the Nicaraguan democratic resistance. Section 105 does not permit intelligence agencies to participate in activities, including training other than communications training provided for pursuant to Section 105, that amount to participation in the planning or execution of military or paramilitary operations *in Nicaragua* by the Nicaraguan democratic resistance, or to participation in logistics activities *integral* to such operations (emphasis added).

CONFERENCE REPORT on H.R. 2419, *supra* note 29, at 16. Whether participation in planning outside of Nicaragua of such operations was prohibited was arguably ambiguous. What degree of involvement in logistical support of military and paramilitary operations by the contras would be deemed "integral" to such operations was a matter that would, in the event, undoubtedly be left to the determination of the Executive.

32. *See, e.g.*, Washington Post, Oct. 8, 1985, at A14, col. 1 (Reagan approval of secret plan to replace CIA funds with private and third-country aid); Washington Post, Aug. 11, 1985, at A1, col. 4 (NSC aide liaison to private groups).

33. *See, e.g.*, Washington Post, Nov. 8, 1985, at A6, col. 1 (radio gear for contras); Washington Post, Sept. 15, 1985, at A9, col. 1 (parliamentary maneuver after end of conference committee work on foreign aid bill; U.S. understandings with allies for latter to send military aid to contras).

and $30 million of "humanitarian assistance," appeared to be inconsistent with the World Court's Order of Interim Protection of May 10, 1984.[34]

In view of the foregoing developments, one might conclude that the United States violated, at least after August 1985, the World Court's Order of Interim Protection of May 10, 1986. However, a careful reading of the second operative paragraph of the Court's order suggests that continued United States support of the contras would not necessarily violate its terms, provided such action could be justified as taken in lawful exercise of the right of collective self-defense under article 51 of the United Nations Charter. The question therefore arises whether the actions taken by the United States against Nicaragua subsequent to May 10, 1984 can be characterized accurately under the rubric of collective self-defense. Moreover, in view of renewed assistance to and cooperation with the contras approved by Congress in August and December 1985, one must ask whether such action by the United States was in compliance with the injunctions contained in operative paragraphs (3) and (4) of the ICJ's Order of Interim Protection. The answers to these questions turn largely on the validity of the U.S. argument that it was acting in collective self-defense, which is considered below.

III. Judgment on Jurisdiction and Admissibility (November 26, 1984)

On November 26, 1984, the International Court of Justice issued a Judgment which held that it had jurisdiction, that there was no ground of inadmissibility that could bar its consideration of the case, and that therefore it would consider and decide on the merits the substantive issues in the claim brought by Nicaragua against the United States.[35] On January 18, 1985, citing errors and distortions of law and fact in the Court's November 26 decision, the United States announced that it would withdraw from further proceedings on the merits in the case of *Nicaragua v. U.S.*[36]

In its Judgment of November 26, the Court held that it had jurisdiction to consider and decide the merits of the case, both (1) under the compulsory jurisdiction established under article 36 paragraphs 2 and 5 of its statute, and (2) pursuant to the compromissory clause contained in the 1956 U.S.–Nicaragua Treaty of Friendship, Commerce and Navigation,[37]

34. *See, e.g.*, N.Y. Times, Feb. 26, 1986, at A21, col. 1; Washington Post, Feb. 19, 1986, at A1, col 5.

35. Judgment of Nov. 26, 1984, *supra* note 5, at 442.

36. *See* U.S. Department of State, Statement on U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, *supra* note 6.

37. Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States–Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024 [hereinafter cited as FCN Treaty].

as authorized by article 36 paragraph 1 of the Court's statute.[38] It also held that none of the issues of admissibility raised by the United States barred the Court from considering the merits of the Nicaraguan claim.[39]

While the Court's Judgment of November 26, 1984 has received considerable commentary,[40] it is useful to recall certain essential points, before considering the nature of the legal obligation contained in article 36(6) of the statute of the ICJ and its broader implications.

A. Specific Issues

When the United States announced its withdrawal from further proceedings on the merits of the case on January 18, 1985, it also issued statements setting forth its reasons for withdrawing, charging broadly that: "Each of the Court's holdings ignores or seriously misstates the evidence and law relevant to the issues before the Court."[41]

A brief consideration of the holdings in the decision throws some light upon this charge. Three issues of jurisdiction were considered by the Court: (1) whether Nicaragua had accepted the compulsory jurisdiction of the ICJ; (2) whether the declaration filed by the United States on April 6, 1984 produced its intended effect of excluding the present case from the United States acceptance of the Court's compulsory jurisdiction; also, whether a reservation, known as the "multilateral treaty reservation" (or Vandenberg Amendment), included in the United States original 1946 declaration accepting the Court's compulsory jurisdiction, had the effect of excluding the present case from the ICJ's jurisdiction; and (3) whether the Court had an independent basis of jurisdiction under the terms of the 1956 U.S.–Nicaragua Treaty of Friendship, Commerce and Navigation. The Court also considered whether the alleged grounds of inadmissibility adduced by the United States barred the Court's adjudication of Nicaragua's claim.

1. *Nicaraguan Acceptance of Compulsory Jurisdiction*

The question of whether Nicaragua had accepted the compulsory jurisdiction of the International Court of Justice was by far the most important in the case, and the only one which produced a significant division

38. Article 36(1) provides: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." I.C.J. Stat., art. 36(1).

39. Judgment of Nov. 26, 1984, *supra* note 5, at 442.

40. *See supra* notes 1, 3, 6; *infra* notes 57, 62.

41. U.S. Department of State, Observations on the International Court of Justice's Judgment on Jurisdiction and Admissibility in the Case of Nicaragua v. United States of America, *supra* note 6 at 250; 79 Am. J. Int'l L. 424.

among the judges of the Court. That question involved the interpretation to be given to article 36(5) of the Court's statute, which provides:

> *Declarations* made under article 36 of the Statute of the Permanent Court of International Justice *which are still in force* shall be deemed, as between the Parties to the present Statute, to be acceptance of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms. (emphasis added)

Specifically, the Court was called upon to decide whether the reference in article 36(5) to "declarations . . . which are still in force" referred only to declarations which had become legally binding under the Statute of the PCIJ,[42] or rather referred to declarations which in accordance with the time limitations contained in them had not expired, and therefore in this sense remained "in force." The latter interpretation appeared to be supported by the French text of article 36(5), which stated that "declarations made . . . for a duration which has not yet expired shall be considered . . . as constituting acceptance of the compulsory jurisdiction of the International Court of Justice for the duration which remains to run according to these declarations and in accordance with their terms."[43] (author's translation)

Essentially, the Court's decision upholding Nicaraguan acceptance rested on three distinct grounds. First, the correct interpretation of the text of article 36(5) in its context and in the light of the object and purpose of the statute of the ICJ—confirmed by state practice reflecting agreement as to its interpretation and by supplementary means of interpretation, including the preparatory work—[44] was that it covered Nicaragua's 1929 declaration. Second, in view of the overriding goal of the drafters of the Statute to substitute the new Court for the old insofar as possible, and without sacrificing any progress made toward the principle of compulsory jurisdiction, Nicaragua's ratification of the new statute produced the same effects as would have its ratification of the old, thus bringing its 1929 declaration into effect and within the terms of article 36(5). Third, Nicaragua's conduct, taking into account the publications of the Court and the generally-held view that it was bound by the Court's compulsory

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42. *See supra* note 13 and accompanying text.

43. The complete French text reads as follows:

> *Les déclarations faites* en application de l'article 36 du Statut de la Cour Permanente de Justice Internationale *pour une durée qui n'est pas encore expirée seront considerées . . . comme comportant acceptation de la juridiction obligatoire de la Cour Internationale de Justice pour la durée restant a courir d'après ces declarations et conformemént a leurs terms* (emphasis added).

I.C.J. STAT. art. 36(5) (French text). The French text is reproduced in Judgment of Nov. 26, 1984, *supra* note 5, at 399 (French translation of opinion).

44. *See* the principles of customary international law regarding treaty interpretation now codified in the Vienna Convention on the Law of Treaties, *supra* note 19, arts. 31-33.

jurisdiction, constituted an effective expression of its consent to be bound by the jurisdiction of the Court under article 36(2).[45]

Those voting with the majority on the question of Nicaragua's acceptance of the Court's compulsory jurisdiction included (with the respective state of nationality in parentheses): Judges Elias (Nigeria) (President of the Court), Sette-Camara (Brazil) (Vice-President of the Court), Lachs (Poland), Morozov (U.S.S.R.), Nagendra Singh (India), Ruda (Argentina), El-Khani (Syria), de Lacharrière (France), Mbaye (Senegal), Bedjaoui (Algeria), and Judge ad hoc Colliard (France) (appointed by Nicaragua pursuant to article 32(2) of the Statute of the Court).[46] Dissenting votes were received from Judges Mosler (Federal Republic of Germany), Oda (Japan), Ago (Italy), Schwebel (United States), and Sir Robert Jennings (United Kingdom).[47]

The basic disagreement between the majority and the five dissenting judges was ultimately the product of different interpretations of the statements in the preparatory work and prior ICJ decisions referring to existing legal obligations or binding declarations under the Statute of the PCIJ. The simple fact of the matter appears to be that, when making these statements, neither the drafters of the statute nor the judges of the Court had ever considered the highly unusual and indeed unique case of a declaration such as that of Nicaragua. According to its terms the latter was of unlimited duration, but it had never become binding prior to 1945 due to the failure of Nicaragua to complete the formalities necessary for ratification of the 1920 Protocol of Signature of the Statute of the Permanent Court of International Justice.[48] In short, the case of Nicaragua was an "unprovided-for case." Recognizing this fact, the majority looked to the broader purposes of the Statute of the ICJ and, strictly applying customary law principles of treaty interpretation, found three bases for holding that Nicaragua had accepted the Court's jurisdiction, as listed above.

The dissenters, on the other hand, seemed to focus more narrowly on the drafting history of article 36(5) itself, concluding from statements there and in prior decisions of the Court that the drafters did not intend to include a declaration such as that of Nicaragua within the purview of that provision. In effect, they viewed Nicaragua's declaration as one that indeed had been provided for by the drafters, by excluding it from the operation of article 36(5).[49] This is certainly a point on which reasonable

45. Judgment of Nov. 26, 1984, *supra* note 5, at 406-15.
46. *Id.* at 442.
47. *Id.*
48. *See supra* note 13 and accompanying text.
49. *See* Judgment of Nov. 26, 1984, *supra* note 5, at 461-65 (Mosler, J., dissenting), 478-89 (Oda, J., dissenting), 522–31 (Ago, J., dissenting), 536-42 (Sir Robert Jennings, J., dissenting), 569-600 (Schwebel, J., dissenting).

and learned experts can—and did—differ. Statements in the preparatory work and in certain previous decisions by the Court would appear, at least at first glance, to support the views of the dissenters. On the other hand, one criticism that could be advanced against their approach, perhaps, is that by treating an "unprovided-for case" as if it had been addressed by the drafters of the charter and the Court itself in previous cases, the dissenters actually went beyond the evidence to be found in the preparatory work, while attaching to it an importance which a strict and rigorous application of the principles of treaty interpretation codified in articles 31–33 of the Vienna Convention would not admit.[50]

Be that as it may, one might certainly consider the Court to have applied those principles in a rigorous and correct manner. Its decision, in this sense, might reasonably be interpreted as one of strict construction of the applicable law regarding the interpretation of treaties. In any event, its holding on the question of Nicaragua's acceptance of the Court's compulsory jurisdiction does not appear to ignore or misstate the evidence and law, but rather merely to constitute one of several possible interpretations on an admittedly difficult issue. In this connection, it is worth noting that in the case concerning the *Aerial Incident of July 27, 1955 (U.S. v. Bulgaria)*,[51] the United States had argued for an interpretation of article 36(5) of the Statute which, relying heavily on the French text, was almost identical with that adopted by the Court in the present case.[52]

50. Such a criticism would be based on highly technical considerations relating to the interpretation of treaties, which may only be sketched here. Recourse to supplementary means of interpretation under article 32 of the Vienna Convention is appropriate "in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable." Vienna Convention on the Law of Treaties, *supra* note 19, art. 32. However, it might be argued, the meaning of article 36(5) can be deduced from the application of article 31(1) and article 31(3) of the Vienna Convention. Although recourse to supplementary means of interpretation such as the preparatory work appears appropriate in the present case, it could be argued that the evidence found there is inconclusive at best, and should not be marshaled to overturn an interpretation resulting from the application of article 31(1) and article 31(3). *See* Vienna Convention on the Law of Treaties, *supra* note 19, arts. 31-33.

51. *See, e.g.*, P. EISEMAN, V. COUSSIRAT-COUSTERE, & P. HUR, PETIT MANUEL DE LA JURISPRUDENCE DE LA COUR INTERNATIONALE DE JUSTICE 81-85 (3d. ed. 1980). For the principal decision, *see* Aerial Incident of 27 July 1955 (Israel v. Bulgaria), 1959 I.C.J. 127 (Preliminary Objections Judgment of May 26).

52. *See* Aerial Incident of July 27, 1955 (U.S. v. Bulgaria), 1959 I.C.J. Pleadings 301, 319-21 (U.S. Countermemorial of Feb. 1960) (Preliminary Objections) [hereinafter cited as U.S. Countermemorial]. Bulgaria's acceptance of the compulsory jurisdiction of the PCIJ, which *had* been legally binding under the old Statute, had lapsed when the PCIJ was dissolved in 1946. Nonetheless, the United States argued that the words "in force" referred to the period of time for which the declaration was to remain operative. Rejecting Bulgaria's contention that its 1921 declaration of unlimited duration had not been "in force" when

Finally, both the United States and Nicaragua appear to have assumed, prior to April 9, 1984, that Nicaragua had accepted the compulsory jurisdiction of the ICJ.[53] Since by the terms of its declaration the United States had undertaken to terminate its declaration only on six month's notice, Nicaragua could arguably have filed a declaration accepting the Court's compulsory jurisdiction under article 36(2) even after the United States' objections became known. Its decision not to do so was probably the result of tactical considerations—to take such action after April 9, 1984 would have required a recommencement of the action by filing a new application if it wished to rely on the new declaration, and doing so might have forfeited the tactical advantage gained by taking the offensive. In the end, Nicaragua's decisions were good enough since the Court held that Nicaragua had indeed accepted the jurisdiction of the Court.

2. *U.S. Acceptance of Compulsory Jurisdiction*

The remaining issues considered by the Court are of secondary importance, and need only be mentioned here. Among them was whether the United States had itself accepted the compulsory jurisdiction on the Court, in view of its attempted modification of the terms of its acceptance on April 6, 1986, and in view of the so-called multilateral treaty reservation (Vandenberg Amendment). Several highly technical arguments regarding

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Bulgaria became a party to the Statute of the ICJ in 1955, the United States stated:

> The United States Government believes that this is not the proper interpretation of Article 36, paragraph 5. The intended and effective meaning of the words "still in force" is to be seen in the French text of the provision: "pour une durée qui n'est pas encore expirée." The declarations referred to in Article 36, paragraph 5 were those made for a duration not yet expired. As applied to the Bulgarian declaration of 1921, the import of Article 36, paragraph 5 is clear: when Bulgaria became a party to the Statute of the Court, no period had come to an end within which the Bulgarian declaration was limited, for, as we have seen, the declaration of 1921 was without limit of time.

Id. at 319.

While the Court had rejected this argument, over a vigorous dissent, in the case of Aerial Incident of 27 July 1955 (Israel v. Bulgaria), *supra* note 51, the important point is that the Court's reading of article 36(5) in the present case was not arbitrary and capricious, as suggested by the fact that the United States had itself urged the Court to adopt a very similar interpretation of that provision in the past—*after* the ICJ's decision in Israel v. Bulgaria. The U.S. discontinued the proceedings against Bulgaria on May 13, 1960, as a result of Bulgaria's invocation of the Connally reservation to the U.S. declaration under article 36(2) of the statute, and of U.S. reconsideration of its interpretation of that reservation. 1960 I.C.J. Pleadings 676-77.

53. Had Nicaragua simply filed a declaration with the Secretary General of the United Nations reaffirming its acceptance of the Court's jurisdiction under article 36(2), effective immediately, the whole question would have been moot. This it might have done immediately prior to filing its application, as Portugal had done in the Right of Passage case. *See* Right of Passage Over Indian Territory (Portugal v. India), 1957 I.C.J. 127, 141, 145-47 (Preliminary Objections Judgment of Nov. 26). Or it might have filed such a declaration after the United States made clear that it would question the validity of Nicaragua's acceptance.

rights asserted by the United States to immediately terminate its acceptance, or to invoke under the principle of reciprocity a similar right allegedly held by Nicaragua were also advanced; however, they were firmly rejected by almost all of the judges. The Court held, by a division of 13–3,[54] that the United States was bound by its compulsory jurisdiction when Nicaragua initiated proceedings on April 9, 1984, particularly in view of the six-month notice requirement contained in its original declaration of 1946.[55]

With respect to the so-called multilateral treaty reservation, the Court held that it could only determine its reach in the merits phase of the proceedings, and that, in any event, it could not prevent the Court from deciding the case on the basis of customary international law. That reservation excepted from the United States acceptance of the Court's compulsory jurisdiction

> disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.[56]

The United Nations Charter, the OAS Charter, and two other conventions, in addition to customary international law, had been relied upon by Nicaragua as a basis for its claim. Whether the Court might rely on these treaties in deciding the case was reserved for final decision in its Judgment on the Merits.[57]

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54. Only one vote was taken on the issue of whether the Court had compulsory jurisdiction to decide the case. All five dissenting judges dissented on the issue of Nicaraguan acceptance of the Court's compulsory jurisdiction. *See supra* notes 47-49 and accompanying text. The 13–3 division on the issue of U.S. acceptance of that jurisdiction is readily apparent from an analysis of the dissenting opinions. *See* Judgment of Nov. 26, 1984, *supra* note 5, at 510-13 (Oda, J., dissenting), 548-55 (Sir Robert Jennings, J., dissenting), 600-28 (Schwebel, J., dissenting). Of particular interest is the fact that each of the dissenting judges disagreed with the Court's opinion on the question of U.S. acceptance of the ICJ's compulsory jurisdiction on a different ground.

55. Judgment of Nov. 26, 1984, *supra* note 5, at 415-21, 442.

56. *See id.* at 421-26.

57. *Id.* The two other treaties were the 1933 Montevideo Convention on the Rights and Duties of States, and the 1928 Havana Convention on the Duties and Rights of States in the Event of Civil Strife. *Id.* at 422.

The multilateral treaty reservation does not appear to have been framed in order to deal with a case such as that before the Court. *See* Kirgis, *Nicaragua v. United States as a Precedent*, 79 AM. J. INT'L L. 652, 654-55 (1985). The Court held only that the reservation could not operate as a bar to exercising jurisdiction, leaving open the question of its applicability in deciding the case on the merits. Professor Briggs has criticized this aspect of the Court's decision, as follows:

> The Court was correct in holding further (paras. 67-76) that the Vandenberg multilateral treaty reservation was no bar *in limine litis* to consideration of Nicaragua's claims, but it appears unfortunate that the Court dismissed it as not exclusively of a preliminary character rather than holding, for example, that it is not the function of the Court to make

3. *Jurisdiction under the Friendship, Commerce and Navigation Treaty*

A separate issue was whether the Court might exercise jurisdiction on the basis of the compromissory clause contained in the 1956 U.S.–Nicaragua Treaty of Friendship, Commerce and Navigation (FCN Treaty). By a vote of 14–2, the Court held that it had jurisdiction under the clause to decide disputes between the parties as to whether the FCN Treaty could be applied to the facts of the present case.[58] The question of the applicability of the Treaty was therefore left to be decided in the Judgment on the Merits.[59]

4. *Admissibility*

In addition to its arguments that the Court lacked jurisdiction, the United States also argued that Nicaragua's claim was not "admissible" and that therefore it would be improper for the Court to decide the case.[60] The

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sense of a reservation that by its terms in nonsensical.
Briggs, *Nicaragua v. United States: Jurisdiction and Admissibility*, 79 AM. J. INT'L L. 373, 378 (1985). The multilateral treaty reservation, it should be noted, has no application to the FCN Treaty and decision under the latter's compromissory clause in accordance with article 36(1) of the Statute of the ICJ. For the Court's holding on the effect of the multilateral treaty reservation in its judgment on the merits, see *infra* notes 111-14 and accompanying text.

58. Judgment of Nov. 26, 1984, *supra* note 5, at 426-29, 442. Judge Ruda (who voted with the Court on the issue of compulsory jurisdiction) and Judge Schwebel dissented. *See id.* at 453-54 (Ruda, J., dissenting), 628-37 (Schwebel, J., dissenting).

59. This holding has been criticized on the ground that the Court should not have decided to exercise jurisdiction under the terms of the FCN Treaty because it is clearly commercial in nature. *See* Kirgis, *supra* note 57, at 656-57.

However, it is clear that a dispute over *whether* the treaty applied to the facts of the case existed between the parties, and the Court could not have reached a different decision without consideration of the merits, which would not have been proper in the preliminary objections stage of the proceedings.

60. The United States advanced five separate grounds of inadmissibility which, in its view, either operated as a legal bar to adjudication or required the Court to decline the case as "a matter requiring the exercise of discretion in the interest of the integrity of the judicial function." These grounds were:

- The absence of indispensable parties meant that a decision by the Court would infringe their rights, particularly that of self-defense, if they were not parties to the proceedings
- The Court could not properly decide the case because Nicaragua's claim dealt with the illegal use of force, a breach of the peace, or acts of aggression, matters whose resolution had been committed by the United Nations Charter to other organs, particularly the Security Council
- Similarly, the subject matter of the dispute was inappropriate for decision by the Court due to its position within the United Nations system, which entrusted such decisions to the political organs of the United Nations in cases involving the ongoing exercise of "the inherent right of individual or collective self-defense" under article 51 of the Charter; moreover, an ICJ decision on the merits would constitute in effect a decision on an appeal

International Court of Justice, by a unanimous vote, rejected each of the five asserted grounds of inadmissibility.[61] Judge Schwebel of the United States joined the remaining members of the Court in their decision that the arguments of the United States regarding inadmissibility were without merit. This result was not surprising in the light of the previous holdings of the Court, including its decision in the case of *United States Diplomatic and Consular Staff in Tehran* in which the United States had taken sharply different views of many of these issues.[62]

B. Points of Criticism

The Court's Judgment on Jurisdiction and Admissibility has been criticized by the United States[63] and others[64] on a number of grounds. In the legal realm, three criticisms have been particularly salient. First, the Court's holding that Nicaragua had accepted the compulsory jurisdiction of the ICJ has been strongly criticized as contrary to the intentions of the drafters of the Statute and inconsistent with previous decisions of the

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from an adverse determination in the Security Council

- The case was inadmissible due to the inability of the judicial function to deal with situations involving ongoing conflict without overstepping its proper bounds, among other reasons, because the Court could not ascertain the legally relevant facts "establishable in conformity with applicable norms of evidence and proof"; and
- Nicaragua had failed to exhaust the established processes for the resolution of disputes arising in Central America, in particular the Contadora peace process. Judgment of Nov. 26, 1984, *supra* note 5, at 429-41.

61. *Id.* at 440-42.

62. *See id.* at 434, 436-37, 439-40. While the issues of admissibility are of minor importance, as reflected by the Court's *unanimous* rejection of each of the United States' contentions, the Reagan administration has relied heavily on admissibility arguments in its criticisms of the Court's Nov. 26, 1984 Judgment on Jurisdiction and Admissibility. For an insightful treatment of these issues, with specific reference to analogous issues in U.S. law, see Chayes, *supra* note 1. Chayes, a former legal adviser of the State Department, has served as Agent of Nicaragua in the present case.

Another aspect of the case has also been the subject of considerable commentary. When El Salvador attempted to intervene in the jurisdictional phase of the proceedings under article 63 of the statute of the Court, in an apparent effort to argue that the Court lacked jurisdiction as between the U.S. and Nicaragua, the Court rejected the Salvadoran declaration by a vote of 14–1, insofar as it related to the present stage of the proceedings. By a closer vote of 9–6, the Court decided not to grant El Salvador an oral hearing. The latter decision has been criticized. For a thorough assessment of this incident, see Sztucki, *Intervention Under Article 63 of the ICJ Statute: The Salvadoran "Incident"*, 79 Am. J. Int'l L. 1005 (1985). For the Court's decision, *see Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), *Declaration of Intervention of El Salvador*, 1984, I.C.J. (Order of Oct. 4), *reprinted in* 24 I.L.M. 38 (1985). *See also* Judgment of June 27, 1986, *supra* note 1, (Separate Opinion of Judge Lachs) (denial of hearing a judicial error, but without prejudice to main case).

63. *See supra* note 6.

64. *See e.g.*, Moore, *supra* note 1, at 92-102; infra notes 153-54 and accompanying text.

Court.[65] Second, the Court's failure to dismiss those of Nicaragua's claims that were brought under the Court's compulsory jurisdiction has been criticized as a failure to give full and proper effect to the multilateral treaty reservation at the preliminary objections or jurisdictional stage of the proceedings. While the Court reserved its final decision on this issue for its judgment on the merits, it did state that it could not dismiss Nicaragua's claims under customary international law simply because the corresponding legal norms had been enshrined in the texts of the multilateral conventions relied on by Nicaragua.[66] Third, the decision has been criticized for its holding that differences over the meaning and application of the FCN Treaty came within the terms of the compromissory clause and should therefore be decided in the merits stage of the proceedings.[67]

A counterargument to these criticisms might be found in the fact that the Court carefully considered the arguments of the parties in reaching its decision, and in the text of article 36(6) of the statute of the Court, which provides, "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."[68] However, before considering the response of the United States to the ICJ's Judgment of November 26, 1984, the World Court's Judgment on the Merits will be examined.

IV. Judgment on the Merits (June 27, 1986)

A. Background: Overview of the Law and Arguments

Nicaragua argued to the Court that the United States had breached the basic provisions of the United Nations Charter and of the Charter of the Organization of American States prohibiting the threat or use of force or intervention in the internal affairs of another state, as well as the corresponding provisions of customary international law. Although the Court ultimately held that it could not rely on these conventions due to the multilateral treaty reservation of the United States, these conventional norms merit brief consideration because they were invoked by Nicaragua, and the United States never argued that it was not bound by these treaty obligations, but rather only that the Court was not competent to apply them or to decide the underlying issues in the present case.[69] Although

65. *See supra* notes 6, 49; Moore, *supra* note 1, at 95-96.

66. *See* Judgment of November 26, 1984, *supra* note 5, at 423–25.

67. *See, e.g.*, Kirgis, *supra* note 57.

68. I.C.J. Stat. art 36(6).

69. *See* Judgment of June 27, 1986 at para. 15 (invoked by Nicaragua); *id.* at paras. 33-34 (U.S. did not argue international law not controlling); Judgment of Nov. 26, 1984, *supra* note 5, at 436-37 (U.S. did not argue international law not directly relevant, nor that case was inadmissible since dealt with "political" and not "legal" question).

the United States was not present to put forth its position that its actions were justified as an exercise of the right of collective self-defense recognized by article 51 of the United Nations Charter, the Court considered it. Article 51 is also discussed in the following.

1. *The Prohibition of the Threat or Use of Force*

The cornerstone of the United Nations Charter is the prohibition against the threat or use of force across international frontiers. This prohibition is expressed in article 2 paragraph 4 of the United Nations Charter in the following terms:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.[70]

At the same time, article 20 of the OAS Charter provides as follows:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, *directly or indirectly*, on any grounds whatever . . . [emphasis added].[71]

The preceding prohibitions also exist in customary international law.[72]

2. *The Principle of Nonintervention*

The principle of nonintervention is not spelled out in the United Nations Charter, although it is derived from the principle of the sovereign equality of states[73] and intervention by the use of force is specifically prohibited by article 2(4). Article 18 of the OAS Charter, on the other hand, is more specific, providing as follows:

> No State or Group of States has the right to intervene, *directly or indirectly, for any reason whatever*, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force, but also any other form

70. U.N. CHARTER art. 2 para. 4. Similarly, article 1 of the Rio Treaty establishes:

> The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty.

Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 1, 62 Stat. 1681, T.I.A.S. No. 1838, 4 Bevans 559 [hereinafter cited as Rio Treaty].

71. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, amended by Protocol of Buenos Aires, art. 20, 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter cited as OAS Charter].

72. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, Principle 1 (Prohibiting the Threat or Use of Force), para. 8, Principle 3 (Duty of Non-Intervention) G.A. Res. 2625, 25 GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration on Friendly Relations]; Judgment of June 27, 1986, *supra* note 1, paras. 187-208.

73. *See* U.N. CHARTER art. 2 para. 1.

> of interference or attempted threat against the personality of the State or against its political, economic and cultural elements (emphasis added).[74]

This prohibition also exists under customary international law as part of the duty of nonintervention in the domestic affairs of another state.[75]

An examination of authoritative interpretations of relevant legal norms that have been made by the United States and other Members of the United Nations in the past provides further specifics regarding the duty of nonintervention. The General Assembly's 1970 Declaration on Friendly Relations, adopted by consensus and with the support of the United States, contained the following language as part of an authoritative interpretation of article 2(4):

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.[76]

This clarification of the reach of article 2(4) was agreed to without a dissenting vote. It now constitutes both an agreed interpretation of article 2(4),[77] and a rule of customary international law.[78] The United States has repeatedly reaffirmed the principle contained in the paragraph quoted above.[79]

In addition to the foregoing clarification, the Declaration on Friendly Relations also reiterated the prohibition of intervention in the domestic affairs of any state, as follows:

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74. OAS Charter, *supra* note 71, art. 18.

75. *See* Declaration on Friendly Relations, *supra* note 72, Principle 3 (Duty of Nonintervention). *See infra* note 80 and accompanying text.

76. Declaration on Friendly Relations, *supra* note 72, Principle 1 (Prohibiting the Threat or Use of Force), para. 8.

77. *See* Vienna Convention on the Law of Treaties, *supra* note 19, art. 31(3). The Committee which elaborated the text of the Declaration, beginning in 1963, worked in general on the basis of unanimity. Rosenstock, *The Declaration on Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 713-14 (1971). Rosenstock characterizes the Declaration as:

> the most important single statement representing what the Members of the United Nations agree to be the law of the Charter on these seven principles. . . . The principles involved . . . are acknowledged by all to be principles of the Charter. By accepting the respective texts, states have acknowledged that the principles represent their interpretations of the obligations of the Charter. The use of the word "should" rather than "shall" in those instances in which the Committee believed it was speaking *de lege ferenda* [i.e., in terms of progressive development of law or law-in-the-making, which has not yet crystallized into customary law] or stating mere *desiderata* further supports the view that the states involved intended to assert binding rules of law where they used language of firm obligation.

Id. at 714-15.

78. *See e.g.*, B. DOHNE, DIE GRUNDPRINZIPIEN DES VÖLKERRECHTS ÜBER DIE FREUNDSCHAFTLICHEN BEZIEHUNGEN UND DIE ZUSAMMENARBEIT ZWISCHEN DEN STAATEN 59-61, 103 (1973); *supra* note 77 and accompanying text; Judgment of June 27, 1986, *supra* note 1, paras. 188-91, 202-10.

79. *See e.g.*, Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 RECUEIL DES COURS 411, 456, 458-60, 482, 482 (1972-II).

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or its political, economic and cultural elements, are in violation of international law.
>
> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.
>
> . . .
>
> Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.
>
> . . .

While the outer limits of the duty of nonintervention have not yet been clearly defined, the prohibition against interference in the domestic affairs of another state now forms a part of the law of the Charter and also of customary international law.[80]

3. *The Right of Individual or Collective Self-Defense*

Actions involving prima facie violations of the foregoing prohibitions may nonetheless be lawful if they can be justified as undertaken in exercise of the right of individual or collective self defense under article 51 of the United Nations Charter. Article 51 provides:

> Nothing in the present Charter shall impair the inherent right of self-defence *if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. *Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council* and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security (emphasis added).[81]

A right of self-defense at least as broad as that recognized by article 51 also exists under customary international law.

There are three essential prerequisites for the lawful exercise of the right of self-defense under article 51 of the U.N. Charter. First, the state exercising the right must either itself be the victim of "an armed attack" by the state against which measures of self-defense are taken, or be re-

80. *See* Declaration on Friendly Relations, *supra* note 72, Principle 3 (Duty of Nonintervention); *supra* notes 72, 77, and accompanying text. For the Court's holding on this point, *see* Judgment of June 27, 1986, *supra* note 1, paras. 191-92, 202-209, 239-45.

81. U.N. CHARTER art. 51.

sponding to a request for assistance in exercise of the right of collective self-defense extended by the state which is a victim of an armed attack. There has been considerable debate, however, over what exactly is required to constitute an armed attack within the meaning of article 51.[82]

Second, lawful exercise of the right must be both necessary to halt the attack in question and proportionate to the threat which such an attack represents. These limitations are inherent in the very concept of self-defense, and correspond to similar requirements found in domestic law.[83]

The final requirement, under the United Nations Charter, is that measures of self-defense "shall be immediately reported to the Security Council." [84] This requirement is of critical importance, for only if it is satisfied can the Security Council identify violations of article 2(4), assess the appropriateness of measures taken in alleged self-defense, and adopt measures necessary to restore international peace and security. However, unlike the first two requirements, the third does not exist under customary international law—where strong institutional links to United Nations machinery are absent.

4. *Key Issues of Fact and Law to be Decided by the Court in the Judgment on the Merits*

The basic position of the United States with respect to the merits stage of the proceedings was that the Court was improperly seized of the case and therefore should not proceed to a decision on the merits.[85] Although

82. *See e.g.*, Malanczuk, *Countermeasures and Self-Defense as Measures Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 705, 756-59 (1983).

83. The requirements of necessity and proportionality were fully developed in customary international law prior to the advent of the U.N. Charter. An authoritative statement of these principles was made, for example, in diplomatic correspondence in *The Caroline* case in 1841 and 1842. In the words of U.S. Secretary of State Daniel Webster, Great Britain could justify its actions in U.S. territory only if it could show:

> [the] necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, *even supposing the necessity of the moment* authorized them to enter the territories of the United States at all, did *nothing unreasonable or excessive; since the act justified by the necessity of self-defense must be limited by that necessity, and kept clearly within it.*

Quoted in I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 42-43 (1963). Regarding the requirements of an armed attack, a request for assistance, necessity and proportionality, *see* Judgment of June 27, 1986, *supra* note 1, paras. 193-200.

84. U.N. CHARTER art. 51. *But see* Judgment of June 27, 1986, *supra* note 1, para. 200 (reporting requirement not a part of customary law of self-defense).

85. *See supra* note 6; *infra* note 145-46 and accompanying text.

Although the United States did not participate in the merits phase of the proceedings, and therefore did not file a memorial addressing the substantive issues, it did publish certain documents setting forth its views of the facts. *See* DEPARTMENT OF STATE, REVOLUTION

the U.S. did not fully articulate its views on the substantive issues of law and fact due to its nonparticipation in the proceedings on the merits, it is still possible to identify basic differences which necessarily existed between Nicaragua and the United States with respect to certain critical substantive issues of fact and law.

One issue was the degree to which Nicaragua had in fact supplied arms and other military assistance to the guerrillas in El Salvador, particularly since 1981. A second issue was whether, assuming arms shipments from Nicaragua to the Salvadoran guerrillas had taken place, such actions gave rise to a right of collective self-defense by the United States to assist El Salvador in bringing such actions to a halt. Third, a number of questions existed with respect to whether the United States had satisfied other conditions necessary for the lawful exercise of the right of self-defense, particularly the requirements of necessity and proportionality in any defensive response involving the use of force. Fourth, there was the question of whether the actions of the contras were legally imputable to the United States, i.e., whether the U.S. exercised such direction and control over their activities as to make them in effect its agents, with the legal consequence that their acts could be attributed to the United States for purposes of legal responsibility.

The Court answered these and a number of other questions in its Judgment on the Merits of June 27, 1986. The following provides a brief examination of that decision highlighting its essential points.

B. The Court's Judgment on the Merits of June 27, 1986

On June 27, 1986, the International Court of Justice handed down its Judgment on the Merits[86] in what will surely be viewed as a landmark decision. On all major substantive issues relating to the use of force and

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Beyond Our Borders: Sandinista Intervention in Central America (1985). This document was made available to the Court on Sept. 13, 1985. *See* Judgment of June 27, 1986, *supra* note 1, at para. 73. *See also* Department of State & Department of Defense, Background Paper: Nicaragua's Military Build-Up and Support for Central American Subversion (July 18, 1984). *Cf.* Moore, *supra* note 1. The United States did inform the Court in general terms that it viewed its actions in Central America as consistent with the provisions of the U.N. Charter, and that,

> [p]ursuant to the inherent right of collective self-defense, and in accord with its obligations under the Inter-American Treaty of Reciprocal Assistance, the United States has provided support for military activities against forces directed or supported by Nicaragua as a necessary and proportionate means of resisting Nicaraguan military and paramilitary acts against its neighbors, pending a peaceful settlement of the conflict.

Quoted in Judgment of June 27, 1986, *supra* note 1, Schwebel, J., dissenting, para. 192. *See also* Judgment of June 27, 1986, *supra* note 1, para. 187 (U.S. views customary law norms governing use of force as identical to those of the U.N. Charter); *supra* notes 72, 75, 76, 79 and accompanying text.

86. Judgment of June 27, 1986, *supra* note 1, para. 292.

intervention, the Court reached its decisions with the concurrence of at least twelve of the fifteen judges. Although Judge Oda of Japan and Judge Sir Robert Jennings of the United Kingdom did join Judge Schwebel of the United States in voting against the Court's holdings regarding the use of force and intervention, they did so on jurisdictional grounds; Judge Sir Robert Jennings also voiced certain reservations about the Court's statement of the law governing collective self-defense, without, however, expressing any view that the actions of the United States were justified in the present case on that ground.[87] At the same time, the Court held by votes of 14–1, with only Judge Schwebel dissenting, that the United States had violated the 1956 U.S.–Nicaragua FCN Treaty by mining Nicaraguan harbors. By a vote of 12-3, it also found the U.S. had violated the Treaty by directly attacking certain targets, and by imposing a general trade embargo.[88]

1. *The Multilateral Treaty Reservation*

In fact, the only major division between the judges of the Court was over the effect to be given to the multilateral treaty reservation contained in the United States 1946 declaration accepting the compulsory jurisdiction of the Court under article 36(2) of its statute. The Court held, by a vote of 11–4, that El Salvador would be "affected" by a decision based on application of multilateral treaties including the U.N. and OAS charters, that therefore the reservation precluded reliance on these treaties in deciding the case, but that Nicaragua's claims might properly be decided under customary international law, general principles of law, and the 1956 U.S.–Nicaragua FCN Treaty.[89] The four voting against the majority on this point were of the view that the reservation should be given no application in the present case.[90] On the other hand, Judges Oda, Schwebel, and Sir Robert Jennings, while voting in favor of the applicability of the multilateral treaty reservation, went on to conclude that application of the reservation barred the Court from adjudicating those of Nicaragua's claims which were based on the Court's jurisdiction under article 36(2) of the statute.[91] Significantly, the disagreement of Judges Oda and Sir Robert Jennings with the majority on the major issues relating to U.S. violations of the customary international law norms prohibiting the use

87. *See id.* at paras. 292(2)-(6), 292(12)-(13); *id.* (Sir Robert Jennings, J., dissenting) (Oda, J., dissenting) (Schwebel, J., dissenting).

88. Judgment of June 27, 1986, *supra* note 1, at paras. 292(7), 292(11), 292(14).

89. Judgment of June 27, 1986, *supra* note 1, at paras. 42-56, 292.

90. *See* Judgment of June 27, 1986, *supra* note 1, (Separate Opinion of Judge Ruda), (Separate Opinion of Judge Elias), (Separate Opinion of Judge Sette-Camara), (Separate Opinion of Judge Ni).

91. *See* Judgment of June 27, 1986, *supra* note 1, (Oda, J., dissenting), (Schwebel, J., dissenting), (Sir Robert Jennings, J., dissenting).

of force and intervention in the affairs of another state was based on this jurisdictional ground; neither expressed agreement with the views of Judge Schwebel or the United States to the effect that U.S. actions in the instant case were legally justified.[92]

2. *Evaluation of the Evidence*

The International Court of Justice employed a cautious approach in its evaluation of the evidence.[93] Proceeding under article 53 of the statute, which requires the Court, when the respondent does not appear, "to satisfy itself . . . that the claim is well-founded in fact and law,"[94] the Court stated that it had treated "documentary material (press articles and various books)" with caution, regarding such sources as not capable of establishing facts, but as material which can nonetheless contribute to the corroboration of a fact and be taken into account to show certain facts are public knowledge. Regarding "statements by representatives of States," the Court considered them to have particular probative value when they acknowledged facts or conduct unfavorable to the state concerned. With respect to "evidence of witnesses"—Nicaragua presented five who gave oral evidence as well as a written affidavit by another—the Court stated that it had not treated opinion as evidence, but only statements regarding facts directly known by the witness concerned; with respect to "affidavits or sworn statements" made by members of a Government, the Court stated that it could rely on admissions against interest, but that for the rest such evidence had to be treated with great reserve.[95] Finally, the Court stated that in view of the special circumstances of the case, it might, within limits, make use of a U.S. State Department publication entitled *Revolution Beyond Our Borders: Intervention in Central America*, despite the fact that it had not been submitted to the Court in any form or manner contemplated by the latter's Statute and Rules.[96]

3. *Findings of Fact*

Having set forth its guidelines for the evaluation of evidence, the Court made a number of factual determinations relating both to U.S. conduct vis-à-vis Nicaragua and the contras, and Nicaraguan conduct vis-à-vis neighboring states, particularly El Salvador. The findings of fact on which

92. *See id.* (Oda, J., dissenting), (Sir Robert Jennings, J., dissenting); *supra* note 87 and accompanying text.

93. *But see* Judgment of June 27, 1986, *supra* note 1, (Schwebel, J. dissenting) (strong disagreement with the proposition in the text).

94. I.C.J. STAT. art. 53.

95. Judgment of June 27, 1986, *supra* note 1, at paras. 27-31, 59-72.

96. *Id.* at para. 73. *See supra* note 85.

the Court's holdings regarding United States violations of international law were based are set forth in the discussion of those holdings below. Worth noting here is the fact that the ICJ rejected Nicaragua's factual allegations on a number of points as not being clearly established by the evidence before the Court.[97]

Of particular importance was the Court's finding that the Nicaraguan charges that the contra forces had been created, and had been directed and controlled by the United States to such a degree as to make them, in effect, its agents, were not clearly established by the evidence.[98] Significantly, the Court also found that support of the guerrillas in El Salvador by military aid arriving from Nicaraguan territory up to the early months of 1981 could be reasonably inferred. The Court held, however, that it could not be assumed that shipment of such military aid was imputable to Nicaragua; and that the evidence before it was insufficient to establish that the government of Nicaragua was itself directly responsible for the flow of arms to El Salvador, either before or after early 1981. With respect to such arms shipments after 1981, the Court found that the evidence was very weak. While it could not conclude that there had been no transport of arms after early 1981, the Court stated that it could not satisfy itself that any continuing flow on a significant scale took place after the early months of 1981.[99]

The Court also found that certain cross-border attacks on Honduras and Costa Rica were imputable to Nicaragua, while also noting that anti-Sandinista forces were active along both borders.[100] Although the ICJ held that these incursions could not be relied upon as justifying the exercise of the right of collective self-defense,[101] its findings of fact regarding these incursions and the shipment of arms from Nicaragua to El Salvador

97. *See generally id.* at paras. 75-171 (findings of fact).

98. *Id.* at paras. 93-116.

99. Judgment of June 27, 1986, *supra* note 1, at paras. 130-60. One of the costs paid by the United States by not participating in the proceedings on the merits seems to have been forfeiting the opportunity to present the evidence, possibly quite strong, supporting its claim that Nicaragua was responsible for the arms shipments to El Salvador prior to 1981. At the same time, however, one of the benefits of nonparticipation may have been the ability to avoid official confirmation that the evidence of arms shipments since 1981 is in fact quite weak.

100. Judgment of June 27, 1986, *supra* note 1, at paras. 161-64.

101. Judgment of June 27, 1986, *supra* note 1, at para. 231. The Court's finding that neither Honduras nor Costa Rica had requested U.S. assistance in meeting an armed attack was the most obvious basis for this holding. While the Court did not go into detail on any additional factors, other than observing that anti-Sandinista forces were active along both borders, it seems possible that it may have also viewed the cross-border incursions or alleged arms shipments as not giving rise to the right of self-defense either because they did not constitute an armed attack or because they had ceased. *See* Judgment of June 27, 1986, *supra* note 1, at paras. 131, 161-66, 231-34, 238.

suggested that had Costa Rica, Honduras, or El Salvador joined the litigation and filed a counterclaim or counterclaims against Nicaragua, the World Court would have been fully prepared to evaluate impartially all evidence submitted, and indeed to hold that Nicaragua had violated international law by such transborder incursions or the supply of material to armed bands in Honduras or Costa Rica—if the evidence supported such charges and Nicaraguan actions could not be justified as an exercise of the right of self-defense.

The Court did not specifically find that Nicaragua had violated international law because no charges had been brought before the Court against Nicaragua. Several of its findings of fact, however, suggested that it might well have held that Nicaragua had violated international law had it been asked to do so.[102]

4. *Violations of Customary International Law*

The Court's articulation of the basic principles of customary international law governing the use of force, intervention in the internal affairs of another state, and related questions achieved a clarity that will not only put to rest a number of doctrinal disputes, but also stand for years to come as the most authoritative statement of the content of contemporary international law relating to these issues. As a statement of existing customary law, the Court's holdings are directly relevant to the interpretation of the U.N. Charter and other treaties whose prohibitions must be construed at least as broad as to encompass obligations under customary law. The Court's Judgment of June 27, 1984 will undoubtedly receive great attention from international lawyers, students, foreign affairs specialists, and others throughout the world. However, it is primarily what the Court held in relation to the U.S. violations of international law charged by Nicaragua that is of the greatest and most immediate concern in the context of the present article. While no short treatment can do justice to the Court's opinion, its principal holdings are briefly summarized below.

a. The Prohibition of the Threat or Use of Force

With respect to United States actions against Nicaragua and in support of the contras, the World Court held that the U.S. had violated the customary international law prohibition against the threat or use of force by

102. Particularly with respect to Nicaraguan government responsibility for arms shipments to El Salvador in 1980-81, it seems possible that the evidence would have supported such a conclusion had it been properly introduced and pleaded to the Court as part of a counterclaim. Regarding allegations of Nicaraguan involvement in infiltrating armed bands into Honduras, which could not be justified as an exercise of the right of self-defense, *see* Moore, *supra* note 1, at 59.

directly attacking Nicaragua—through the actions of its officials and individuals acting on its behalf—in a number of instances. These included: (1) the laying of mines in Nicaraguan internal or territorial waters in 1984;[103] (2) attacks on an underwater oil pipeline at Puerto Sandino on September 13, 1983 and October 10, 1983; (3) an air and sea attack on the port of Corinto on October 10, 1983 causing the destruction of oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population; (4) an attack by speedboats and helicopters using rockets against the Potosí Naval Base, on January 4–5, 1984; (5) an attack on March 7, 1984 by speedboats and helicopters on an oil storage facility at San Juan del Sur; (6) clashes between speedboats and a helicopter and Nicaraguan patrol boats at Puerto Sandino, during minelaying operations on March 28–30, 1984; and (7) fire support provided by a helicopter, launched from a mother ship, in support of an anti-Sandinista (ARDE) attack on San Juan del Norte, on April 9, 1984. However, the Court was unable to find that U.S. military maneuvers near the Nicaraguan border had constituted a threat or use of force.[104]

Second, the ICJ held that the United States had also violated the prohibition of the threat or use of force by the arming and training of the contras. On the other hand, the mere supply of funds to the contras did not constitute a use of force in violation of this prohibition, although it did violate the principle of nonintervention.[105] Significantly, the Court found that the actions of the contras could not as a whole be treated as imputable to the United States, despite the high degree of the latter's involvement in training, equipping, and supporting the contras.[106]

b. The Principle of Nonintervention

Focusing primarily on the aspects of intervention involving military activities, the World Court found it "clearly established" that "the United States intended, by its support of the contras, to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of State sovereignty, to decide freely"[107]—including, for example, "the choice of a political, economic, social and cultural system, and the formulation of foreign policy."[108] Finding that the contras' aim was the overthrow of the Sandinista government of Nicaragua, and that support of a group with such a goal, regardless of whether a state's own

103. Judgment of June 27, 1986, *supra* note 1, paras. 80, 227.
104. *Id.* at paras. 80, 81, 86, 227.
105. *Id.* at para. 228.
106. This finding was based on a very close reading of the facts as revealed by the evidence made available to the Court. *Id.* at paras. 93-115.
107. *Id.* at para. 241.
108. *Id.* at para. 205.

objective was merely coercion or the overthrow of another government, was inadmissible,[109] the World Court held that

> the support given by the United States, up to the end of September, 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention.[110]

With respect to the provision of so-called "humanitarian assistance" to the contras after August 1985, the Court noted that it had no information on how the August 1985 legislation had been implemented. It did state, however, what it considered to be the applicable law. First, in order not to constitute unlawful intervention, "humanitarian assistance" must be limited to the purposes pursued in the practice of the International Red Cross, i.e., "to prevent and alleviate human suffering" and "to protect life and health and to ensure respect for the human being." Second, "it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents."[111] At the same time, the Court clearly suggested, in a brief comment, that the provision of intelligence information to the contras would violate the principle of nonintervention.[112]

While the Court found that United States support of the contras represented a clear violation of the principle of nonintervention, it also held, quite interestingly, that none of the economic measures taken by the U.S. against Nicaragua and complained of by the latter—i.e., a cut-off in aid, a reduction in the sugar quota, attempts to block the granting of loans by international financial institutions, or the general trade embargo imposed on May 1, 1985—violated the principle of nonintervention prohibiting interference in Nicaragua's internal affairs.[113] Though of minor interest in the present case, this holding was one of major importance as a statement of the present customary law duty of nonintervention.

c. Other Principles of Customary International Law

The World Court found that the actions which violated the foregoing principles regarding the non-use of force and nonintervention also violated the principle of respect for state sovereignty which was a fundamental norm of customary international law. In addition to these violations, cer-

109. *Id.* at paras. 239-41.

110. *Id.* at para. 242. Worth noting is the Court's factual finding that the U.S. had continued its support of the contras until Sept. 1984, i.e., some four months after the Court's Order of Interim Protection of May 10, 1984. *Cf. infra* notes 137-38 and accompanying text (ICJ's statements regarding Order of Interim Protection).

111. Judgment of June 27, 1986, *supra* note 1, at paras. 242-43.

112. *Id.* at para. 243. *See supra* note 111 and accompanying text.

113. Judgment of June 27, 1986, *supra* note 1, at paras. 244-45.

tain overflights of Nicaraguan territory by U.S. aircraft, including those causing loud sonic booms, were held to have violated this principle,[114] while the mining of Nicaraguan ports had also violated Nicaragua's customary law right of freedom of commerce and maritime communications.[115]

With respect to U.S. responsibility for atrocities committed by the contras, the Court held that due to the absence of the requisite degree of direction and control over the specific operations in which such events occurred, the actions of the contras were not imputable to the United States.[116] However, the Court did find that common article 3 of the 1949 Geneva Conventions represented customary international law, and that the U.S. also had a duty under customary international law to "respect" and even "to ensure respect . . . in all circumstances" for the principles of humanitarian law embodied in article 3 common to the four conventions.[117] This duty it had breached, the Court held, by publishing and disseminating a psychological warfare manual for the use of the contras which advocated violations of the essential provisions of humanitarian law contained in common article 3.[118]

Moreover, the United States had also violated its duty under customary international law to notify shipping of its mining operations, thus disregarding the "elementary considerations of humanity" invoked by the Court in its 1949 *Corfu Channel* decision.[119] Finally, the ICJ found that the U.S. had violated its duty under customary international law not to defeat the object and purpose of its 1956 FCN Treaty with Nicaragua. The direct attacks on ports and oil installations, mining operations, and the economic embargo were held to have violated this duty.[120]

5. *Violations of the FCN Treaty*

Nicaragua had also charged the United States with violation, through the actions referred to above, of the 1956 U.S.–Nicaragua FCN Treaty. In view of its holding that the actions of the contras were not imputable to the United States, the Court rejected the charge that, in contravention of article I of the Treaty, the U.S. had failed to provide "equitable treatment" to Nicaraguans by, among other things, killing them through the

114. *Id.* at paras. 251. *See id.* at paras. 87-91.

115. Judgment of June 27, 1986, *supra* note 1, at para. 253. While the Court did not so hold because it was not asked to do so, its opinion suggests that the rights of third states were also violated by the mining of Nicaraguan ports and harbors. *See id.* at paras. 214, 253.

116. Judgment of June 27, 1986, *supra* note 1, paras. 115, 216, 254.

117. *Id.* at paras. 219-20.

118. *Id.* at paras. 254-55.

119. *Id.* at para. 215.

120. *Id.* at paras. 275-76.

actions of the contras.[121] However, the Court did find that U.S. mining of Nicaraguan ports and the trade embargo had violated Nicaragua's rights, under article XIX of the Treaty, to freedom of communication and commerce.[122]

With respect to a proviso in article XXI(1) (d) excepting from the Treaty measures necessary to protect the "essential security interests" of the parties, the Court, eschewing the possibility of a restrictive interpretation of this term,[123] held simply that the mining operations, "direct" attacks, and economic embargo could not be deemed as having been necessary to protect the essential security interests of the United States. Consequently, article XXI(1)(d) provided no defense against holding that the United States had committed the violations of the FCN Treaty referred to above.[124]

6. *Justification of Collective Self-Defense*

The United States legal justification for its actions, advanced in earlier stages of the proceedings, was that its actions had been fully justified as acts undertaken in exercise of the right of collective self-defense recognized by article 51 of the United Nations Charter. The Court, after finding that such a right of collective self-defense existed under customary law,[125] proceeded to define with some precision the conditions necessary for the lawful exercise of that right.

First, it held that an "armed attack" was a prerequisite for any exercise of the right of self-defense.[126] Second, with respect to collective self-defense, it declared that the state that was a victim of an armed attack must form and declare the view that it has been so attacked, and that it must also formulate a request for assistance from another state in responding to that attack, before the latter's actions could be justified as an exercise of the right of collective self-defense.[127] Moreover, the traditional requirements of necessity and proportionality must also be met.[128]

121. *Id.* at para. 277.
122. *Id.* at paras. 277-79.
123. The provision might have been interpreted as referring to the applicability of certain most-favored-nation and nondiscrimination clauses of the treaty, without reaching a construction that would exclude violations of international law from the scope of the treaty. Such a restrictive construction would appear to be correct, particularly in view of article 103 of the U.N. Charter which provides that the rights and obligations contained in the latter shall prevail over any conflicting provisions found in other treaties. As the multilateral treaty reservation did not apply to construction of the FCN Treaty, article 103 could have been invoked; however, the Court was apparently of the view that it need not reach that issue.
124. Judgment of June 27, 1986, *supra* note 1, paras. 280-82.
125. *Id.* at para. 176.
126. *Id.* at para. 195.
127. *Id.* at paras. 193-200.
128. *Id.* at para. 194.

Applying these conditions to the case at hand, the Court found that there had been no armed attack by Nicaragua against El Salvador. Even assuming that the Nicaraguan government had itself been responsible for the shipment of arms to El Salvador, a conclusion which it was unable to reach on the basis of the evidence before it, the Court held that such shipments would not constitute an armed attack.[129] Neither Costa Rica nor Honduras had requested U.S. assistance in exercise of the right of collective self-defense, the ICJ found; nor did it appear that El Salvador had made such a request before mid-1984. With respect to the requirements of necessity and proportionality, the Court held that no necessity for the use of force appeared to exist in December 1981 (when U.S. support of the contras began), while certain actions such as the mining of Nicaraguan harbors and "direct" U.S. attacks on oil installations and ports violated the proportionality requirement.[130]

7. *Other Possible Justifications of U.S. Actions*

In discharging its duties under article 53 of its statute, the World Court also examined additional arguments that might have been invoked to excuse U.S. actions. First, and most important, the Court held that U.S. intervention against Nicaragua could not be justified as a third-state countermeasure (formerly referred to as a reprisal). Thus, even if Nicaragua had intervened illegally in El Salvador (e.g., by itself furnishing arms and other assistance to the Salvadoran guerrillas), there was no right of collective intervention in response under existing customary international law.[131] This holding has important implications regarding the admissibility of countermeasures by third states, which, however, will not be examined here.

Second, the ICJ held that the pledges made by the Sandinistas (FSLN) to the Organization of American States in 1979 did not involve a legal undertaking.[132] Even if they had, it would be the OAS, not the United States, which would be responsible for monitoring compliance with them; in any event, the U.S. could not use force or any other means the OAS itself could not employ in order to ensure compliance.[133] The Court, moreover, stated unequivocally that there was no basis in international law for any purported right of what it termed "ideological intervention."[134]

Noting that Nicaragua was a party to various human rights treaties including the American Convention on Human Rights, and that the Inter-

129. *Id.* at paras. 164, 230.
130. *Id.* at paras. 232-37.
131. *Id.* at paras. 201, 210-11, 246-49.
132. *Id.* at para. 261.
133. *Id.* at para. 262.
134. *Id.* at paras. 263-65.

American Commission on Human Rights had twice carried out investigations in Nicaragua, demonstrating that the enforcement machinery established under the convention was functioning, the Court concluded:

> In any event, while the United States might form its own appraisal of the situation as to human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With respect to the measures actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras.[135]

As in the case of third-state countermeasures, this holding has broad implications which, however, will not be explored here.

Finally, the Court observed that there were no principles of customary international law regulating the level of armaments a state might establish, unless, of course, it entered into agreements establishing such limitations. Thus the "militarization" of Nicaragua did not afford the United States with any legal defense for its actions.[136]

8. *Other Holdings*

In conclusion, the World Court recalled to the parties the injunctions contained in its Interim Protection Order of May 10, 1984. While not directly referring to the issue of U.S. compliance with that order,[137] it did stress that "it is incumbent on each party to take the Court's indications [of provisional measures] seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights."[138] This appeared to be an oblique reference to the rather extreme reliance placed by the United States on its collective self-defense justification in the face of the Court's Order of May 10, 1984, under circumstances in which the validity of the argument was obviously open to serious doubt.

After reminding the parties of their obligation under customary international law to seek a peaceful resolution of the dispute between them, the Court suggested that a renewed emphasis on the search for peace within "the Condadora Process" would be desirable and in keeping with this obligation.[139]

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135. *Id.* at paras. 267-68.

136. *Id.* at para. 269.

137. One of the Court's factual findings, however, suggested that the U.S. had violated the Order from May to Sept., 1984. *See supra* note 110 and accompanying text. At the same time, while withholding judgment on the issue of whether the U.S. had violated the Order by actions carried out pursuant to legislation adopted in August 1985, in view of its lack of information regarding such actions, the Court made it clear that such actions would, if carried out, be in violation of customary international law. *See supra* notes 110-12 and accompanying text.

138. Judgment of June 27, 1986, *supra* note 1, paras. 286-89.

139. *Id.* at paras. 290-91.

9. *The Dispositive Clauses and the Corresponding Votes*

In the sixteen subparagraphs of paragraph 292 of the decision, the judges of the Court summarized and recorded their specific holdings and the corresponding votes on each. Of greatest importance, the Court, by a vote of 12–3, decided "that the United States of America is under a duty immediately to cease and refrain from all such acts as may constitute breaches of the foregoing legal obligations."[140] The Court also held that the United States owed reparation to Nicaragua for breaches of its international legal obligations toward that state, and that determination of the amount of damages would be reserved for a subsequent stage of the proceedings.[141]

While consideration of the dissenting opinions in the World Court's Judgment of June 27, 1986 is beyond the scope of the present article,[142] the fact that the Court spoke with a strong majority was sure to give its judgment the greatest possible authority.

V. Arguments for Ignoring the Judgment on the Merits

A. The Attack on the Court

In withdrawing from further proceedings on the merits of the case on January 18, 1985,[143] the United States declared that, "The Court's Judgment of November 26, 1984, finding that it has jurisdiction, is contrary to law and fact,"[144] and asserted that "[T]he Court decided—in spite of the overwhelming evidence before it—that it does have jurisdiction. . . . This decision is *erroneous as a matter of law* and is *based on a* misreading and *distortion of the evidence and precedent. . . .*" (emphasis added).[145] The statement suggested that the Court had acted on the basis of political and not legal considerations. The United States stated:

140. *Id.* at para. 292(12).

141. *Id.* at paras. 292, 292(15).

142. Judge Schwebel's dissenting opinion sets forth in great detail the many issues of fact and law with respect to which he disagreed with the Court. His opinion is nearly as long as that of the Court, with a factual appendix as long as his dissent. *See* Judgment of June 27, 1986, *supra* note 1, (Schwebel, J., dissenting). Judges Oda and Sir Robert Jennings also wrote dissenting opinions. In addition, Judges Lachs, Ruda, Elias, Ago, Sette-Camara and Ni appended separate opinions of varying length to that of the Court. *See id.*

143. U.S. Department of State, Observations on the International Court of Justice's Judgment on Jurisdiction and Admissibility in the Case of *Nicaragua v. United States of America, supra* note 6, at 24 I.L.M. 249, 250, 79 Am. J. Int'l L. 423, 424.

144. U.S. Department of State, Statement on U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, *supra* note 6, at 246.

145. *Id.* at 246-47.

> *The decision of November 26 represents* an overreaching of the Court's limits, a departure from its tradition of judicial restraint, and *a risky venture into treacherous political waters*. We have seen in the United Nations, in the last decade or more, how international organizations have become more and more politicized against the interests of the Western democracies. *It would be a tragedy if these trends were to infect the International Court of Justice*. We hope this will not happen, because a politicized Court would mean the end of the Court as a serious, respected institution. Such a result would do grievous harm to the goal of the rule of law (emphasis added).[146]

This attack[147] was continued on October 7, 1985, when the United States announced that it would withdraw from the compulsory jurisdiction of the ICJ.[148] In a State Department "Press Statement" of that date, the Reagan administration justified this action on several grounds. These included the fact that fewer than one-third of the world's nations had accepted the ICJ's jurisdiction, contrary to United States expectations in 1946. Reiterating its disagreement with the Court's Judgment of November 26, 1984, it asserted, "Nor, in our judgment, has Nicaragua." More importantly, the State Department declared:

> In 1946 we accepted the risks of our submitting to the Court's compulsory jurisdiction because *we believed* that the respect owed to the Court by other states and *the Court's own appreciation of the need to adhere scrupulously to its proper judicial role, would prevent the Court's process from being abused for political ends. These assumptions have now proved wrong* (emphasis added).

"As a result," the statement continued, the President had concluded that continuation of United States acceptance of the compulsory jurisdiction of the ICJ "would be contrary to the principle of the equal application of the law and would endanger our vital interests."[149]

In justification of the earlier United States withdrawal from participation in the proceedings on the merits, the State Department affirmed the following:

> *Neither the rule of law nor the search for peace* in Central America *would have been served* by further United States participation. *The objectives of the ICJ* to which we subscribe—the peaceful adjudication of international disputes—

146. *Id.* at 248.

147. Regarding the statement of January 18, 1985, *see* Franck, *Icy Day at the ICJ*, 79 AM. J. INT'L L. 379 (1985); Malloy, *supra* note 1, at 89-91.

148. The United States formally served notice, effective six months from that date, of its withdrawal from the compulsory jurisdiction of the International Court of Justice. Note from Secretary of State George P. Shultz to the Secretary General of the United Nations, Oct. 7, 1985, *reprinted in* 24 I.L.M. 1742 (1985) (notice of withdrawal from compulsory jurisdiction of the ICJ).

149. U.S. Department of State, Press Statement, Oct. 7, 1985, *reprinted in* 24 I.L.M. 1743, 1743-45 (1985) [hereinafter cited as Press Statement of Oct. 7, 1985] (statement regarding withdrawal from compulsory jurisdiction of ICJ). With respect to "equal application of the law," it should be noted that under the compulsory jurisdiction of the ICJ the United States would be subject to suit only by states accepting the same obligation.

> *were being subverted by the efforts of Nicaragua* and its Cuban and Soviet sponsors *to use the Court as a political weapon.* Indeed, the Court itself has never seen fit to accept jurisdiction over any other political conflict involving ongoing hostilities (emphasis added).

"This action," the United States maintained, "does not signify any diminution of our traditional commitment to international law and the International Court of Justice *in performing its proper functions*" (emphasis added). The statement concluded with the affirmation that the United States would continue to use the Court when its jurisdiction was based on article 36(1) of the statute, pursuant to treaties and to ad hoc special agreements submitting specific cases to the Court for decision.[150] Thus the United States' commitment to the principle of peaceful settlement of disputes through international adjudication reverted to the minimal acceptance of that principle *mandated* by the United Nations Charter and the annexed Statute of the International Court of Justice.[151]

The October 7 statement continued the attack on the authority and integrity of the Court, which was judged to have failed in its duty "to adhere scrupulously to its proper judicial role." This statement continued a major theme of the United States statements on January 18, 1985, and suggested the line of attack upon the Court which might be expected if and when the United States decided to ignore a final adverse decision by the ICJ on the merits.

B. Legal Arguments

Two other arguments that have been advanced by legal scholars could be used by the Reagan administration in an attempt to justify U.S. nonobservance of the final judgment of the World Court. First, it has been argued that, "Under the recognized principle in international law of *excès de pouvoir,* decisions of an international legal tribunal that exceed its jurisdiction are void."[152] Even this doctrine, however, requires that the irregularity must be manifest, a condition which is not met in the present case.[153] The *excès de pouvoir* argument seems to overlook article 36(6) of the statute of the ICJ which gives the Court authority to settle any

150. *Id.* at 1744-45.

151. For a critique of the U.S. withdrawal from the compulsory jurisdiction of the ICJ and the statement made at that time, see Gardner, *U.S. Termination of the Compulsory Jurisdiction of the International Court of Justice*, 24 COLUM. J. TRANSNAT'L L. 42 (1986).

152. Moore, *supra* note 1, at 96-99.

153. Given the detailed reasoning of the Court in its Judgment of Nov. 26, 1984, and that eleven members of the International Court of Justice voted in favor of even the most disputed holding, the decision cannot be characterized as one "where the Court manifestly overreaches its jurisdiction under article 36(1)-(5)" of its statute, as charged by one scholar. The change is found in Moore, *supra* note 1, at 96.

dispute as to whether it has jurisdiction. Such a decision of the Court regarding its jurisdiction would seem to be binding under article 94(1) of the United Nations Charter in which a U.N. Member undertakes to comply with the decision of the ICJ in any case in which it is a party. Moreover, as a Charter norm, article 94(1) overrides any principle that might be found in customary international law.[154]

The second argument is based on the beginning language of article 51 of the U.N. Charter, which states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs. . . ." From this language, one author deduces that

> nothing in the Statute of the Court, as well as in the rest of the Charter, can lawfully serve as the basis for impairing the inherent right of self-defense against an ongoing armed attack, and the Court cannot lawfully issue an order impairing this right.[155]

This argument fails to make the critical distinction between impairing a right, on the one hand, and determining its reach and whether or not action taken in alleged exercise of that right is lawful in fact, on the other.[156] Such an interpretation would appear to be unfounded. If advanced by the United States as a justification for defying the ICJ's final judgment on the merits, it would undermine the authority of the Court's decisions, setting a precedent that could be invoked by any future violator of international legal norms governing the use of force.[157]

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154. Professor Reisman has made the same argument based on the doctrine of *excès de pouvoir*. *See* Reisman, *Has the World Court Exceeded its Jurisdiction?*, 80 AM. J. INT'L L. 128 (No. 1, 1986).

However, both Moore and Reisman seem to have overlooked the existence of article 94(1) of the United Nations Charter. The International Court of Justice is no ordinary arbitral tribunal, but rather "the principal judicial organ of the United Nations, U.N. CHARTER art. 92, whose decisions are final and binding on any Member which is a party to the case decided. U.N. CHARTER art. 94 para. 1. *See also* I.C.J. STAT. arts. 59-60.

155. Moore, *supra* note 1, at 99. *See also id.* at 99-101.

156. *See, e.g.*, H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 177-82, 393-95 (1933). Arts. 36 and 38(1) of the Statute of the ICJ clearly confer authority on the Court "to decide in accordance with international law such disputes as are submitted to it." I.C.J. STAT., art. 36, art. 38(1) (quoted). *See, e.g., U.S. Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 3, 18-22 (Merits).

157. Nor is there any validity to an argument that could be advanced that the Court's judgment on the merits is not executory unless and until the Security Council acts to enforce it. The obligation to comply with the decisions of the ICJ established in art. 94(1) is a primary legal obligation, and is in no sense contingent on action by the Security Council under art. 94(2). *See* U.N. CHARTER art. 94 para. 1. Art. 94(2) of the Charter provides:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party *may* have recourse to the Security Council, which *may*, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment (emphasis added).

U.N. CHARTER art. 94 para. 2. This provision refers to a facultative power only, and not

VI. Conclusions

The World Court's decisions in *Nicaragua v. U.S.* and initial indications from the United States that it does not intend to comply with the ICJ's judgment on the merits raise important questions about whether the Court has acted improperly, whether the United States is justified in not complying with its judgment on the merits, and what are the implications of continued U.S. noncompliance with the Court's Judgment of June 27, 1986.

These questions are sure to be the subject of continuing scholarly and political debate, and not only in the United States. Indeed, it is difficult to imagine that these issues will not remain on the political agendas of both the United States and other states so long as the United States continues its current policies toward Nicaragua.

Three categories of issues are of particular importance: (1) the content of the substantive norms of international law governing the use of force, intervention, and the right of individual or collective self-defense; (2) the question of whether the ICJ's judgment on the merits is legally binding on the United States; and (3) the implications of U.S. noncompliance with the Court's Judgment of June 27, 1986.

First, with respect to the substantive norms of international law governing the use of force and intervention in the internal affairs of another state, it must be recognized that the Court's statements in *Nicaragua v. U.S.* are formally limited in their applicability to the present dispute[158] and they refer only to the corresponding principles of customary international law. Nonetheless, statements of the Court are generally viewed by the majority of publicists or experts in public international law as the most authoritative statement of the principles of customary international law involved. It is also likely that the corresponding norms in the United Nations Charter and other conventions, including the OAS Charter, will be interpreted as including, at a minimum, the specific requirements enunciated by the Court in its statement of the customary law governing the threat or use of force, intervention, self-defense and related matters.

These considerations are important because they will directly influence perceptions by many governments and experts in international law of the legality—and hence the legitimacy—of a government's actions in a given

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to a condition precedent to the binding effect of an ICJ judgment.

Significantly, Charles E. Redman, a State Department spokesman, when asked after the Court's merits decision about the possibility of the Court ordering the United States to pay damages to Nicaragua, replied: "The Court's decisions are not self-enforcing. It doesn't have the power to order anything." Washington Post, June 28, 1986, at A14, col. 2. *See supra* note 69.

158. *See* I.C.J. STAT. art. 59.

case. Specifically, they are likely to influence perceptions of the legitimacy of U.S. actions vis-à-vis Nicaragua. Such perceptions tend to have broader implications for the eventual success of a nation's foreign policy, both generally and with respect to particular subjects or areas.

The second category of issues—whether the World Court's Judgment of June 27, 1986 is legally binding on the United States—are of critical and far-reaching importance. On the one hand, critics of the Court's decisions in the present case argue that the Court exceeded its jurisdiction by deciding that Nicaragua accepted the ICJ's compulsory jurisdiction under article 36(2) and (5) of the Court's statute, by failing to give full effect to the multilateral treaty reservation contained in the U.S. declaration accepting the Court's jurisdiction under article 36(2), or by proceeding to adjudicate a claim which by its nature was inadmissible or nonjusticiable because it involved an ongoing armed conflict, or was a matter to be properly decided by the Security Council.

On the other hand, article 36(6) of the statute of the Court provides that in the event of a dispute as to its jurisdiction, the Court shall decide the matter. Moreover, article 94(1) of the United Nations Charter on its face requires U.S. compliance with the Court's judgment on the merits. In the present case, the International Court of Justice gave careful consideration to each of the arguments reflected in the criticisms referred to above, and by a large majority decided that it did have jurisdiction to decide Nicaragua's claims. Then, despite the nonappearance of the U.S. in the merits phase of the proceedings, it weighed the factual and legal arguments that might have been advanced by the U.S., before reaching its final decision on the merits. It found, by a majority of 12–3, that the United States had breached its obligations under customary international law norms governing the use of force, intervention, and collective self-defense. By votes of 14–1, it found that the U.S. had also breached specific obligations under the FCN Treaty.

In deciding whether the Court's decision on the merits is legally binding on the United States, one must consider whether the authoritative legal process established prior to the present dispute, with the active participation and leadership of the United States, is somehow flawed. More important, one must consider whether it is ever appropriate for one party to a dispute before the Court to unilaterally decide whether or not the Court's decisions are so flawed as to remove the legal obligation under article 94(1) of the charter to comply with its decisions.

In seeking to answer these questions, it is helpful to focus in particular on the Court's decision that the U.S. had violated the FCN Treaty. Exercising jurisdiction under the compromissory clause in the Treaty and article 36(1) of the statute of the Court, the Court decided that the United States had violated the FCN Treaty and owed Nicaragua reparation for

such violations. Here, neither Nicaraguan acceptance of the ICJ's compulsory jurisdiction under article 36(2) and (5), nor the U.S. multilateral treaty reservation was at issue, whereas the Court decided it had jurisdiction by a vote of 14–2 and that the U.S. had violated the Treaty by votes of 14–1 and 12–3. If the United States is not bound by article 94(1) of the U.N. Charter to comply with even this part of the judgment on the merits, a persuasive legal argument, not yet heard, must be advanced. The ultimate question that must be addressed, therefore, is whether the jurisdiction of the World Court can ever be truly compulsory—either under article 36(1) or article 36(2) of its Statute—if a party to a dispute before the Court may unilaterally determine that the Court has exceeded its powers or otherwise acted improperly.

The third category of questions concerns the implications of noncompliance by the United States with the ICJ's judgment on the merits. One implication is that, given the broad nature of the charges leveled against the Court by the U.S., other states may follow the lead of the United States in "rejecting" the jurisdiction of the World Court and refusing to comply with an adverse judgment on the merits.[159] A second implication is that international law may come to be viewed by top decisionmakers as even more irrelevant than it has been viewed in the past, particularly if the United States is seen as acting in flagrant violation of international law in its conduct toward Nicaragua with apparent impunity. Moreover, if the United States endorses such conduct through its own behavior, one should not be surprised if other nations follow its example in the future.

There are, of course, many further implications of U.S. noncompliance with the Court's decision, which will not be considered here. But the basic question remains as to whether nations should be bound by international law when they consider their vital interests to be at issue, or when in their view a dispute is of a "political" rather than a "legal" nature. Interestingly, this same issue was the subject of intense debate at the First Hague Peace Conference in 1899. The effort to create a World Court foundered then, though it became a reality following World War I. By 1945, and another world war, the United States was ready to join the Court, even accepting its compulsory jurisdiction under article 36(2) in 1946. Yet, some forty years later, and notwithstanding the great strides that have been made in the development of international law and legal

159. Nicaragua filed an application in the ICJ against both Costa Rica and Honduras on July 28, 1986. Washington Post, July ——, 1986, at A—, col. —. Honduras "rejected" the Court's jurisdiction several days later. Washington Post, July 31, 1986, at A28, col. 1. The Honduran "rejection" was decided upon notwithstanding the fact that Nicaragua and Honduras had both indisputably accepted the Court's jurisdiction under Article 36(2) as of the date of the application, and the absence in the Honduran declaration of acceptance of any multilateral treaty reservation.

institutions, this fundamental question remains unresolved, at least on the political level, in some quarters.

If international lawyers are to contribute to efforts to strengthen the influence of international law in world affairs, they must come to terms with the full implications of the present crisis and, with conviction and all of their persuasive talents, engage broader political sectors in the debate over the importance of international law. In view of the developments described in this article, international lawyers need to focus on the vision of the world they would like to help achieve, and the kinds of policies and actions that might logically lead toward that result.[160]

160. As this article goes to press, the United States vetoed the UN Security Council's resolution which reaffirmed the authority of the ICJ. The resolution called on all nations to comply with the June 27, 1986 decision of the Court and to refrain from any political, economic or military action that might impede the peace efforts of the Contadora nations. It did not condemn nor mention the United States by name. No other nation on the 15-member council joined with the United States, eleven nations supported the resolution. Great Britain, France and Thailand abstained on the final vote.

Vernon A. Walters, the chief U.S. representative to the UN, said that the United States had vetoed the resolution because it "could not, and would not, contribute to the achievement of a peaceful and just settlement of the situation in Central America." L.A. Times, Aug. 2, 1986, Pt. V, at 4, cols. 1-2 (Editorial).